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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 462

BRANKO KARADZOLE, Consul General of the Federal People's Republic of Yugoslavia, and

ROBERT W. WARE, United States Marshal, *Petitioners*,

v.

ANDRIJA ARTUKOVIC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Branko Karadzole, Consul General of the Federal People's Republic of Yugoslavia, and Robert W. Ware, United States Marshal, appellants below, pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California, Central Division (App. A, pp. 1a-4a, *infra*), is reported at 140 F.

Supp. 245. The opinion of the Court of Appeals for the Ninth Circuit (App. B, pp. 4a-17a, *infra*) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, is dated June 24, 1957, and was filed and entered that day (App. C, p. 17a, *infra*). The jurisdiction of this Court is invoked under Tit. 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether in the construction and application in particular circumstances of a treaty provision common to most, if not all, treaties of a class of treaties to which nations generally are parties, there should be taken into account international acts in which the United States participated, such as resolutions of the General Assembly of the United Nations, which evidence and are premised upon a general understanding among nations as to the construction and application of such provision in such circumstances.

2. Whether the adoption of resolutions by international bodies, such as the General Assembly of the United Nations, with the concurrence of the United States, calling upon member nations and non-member nations alike upon demand and the making of a *prima facie* case, to surrender for trial persons charged with the commission of war crimes, as defined by international agreement to which the United States is a party, to the countries where such crimes were com-

mitted, is to be taken as evidencing and being premised upon a general understanding among nations, including the United States, that such war crimes are not political offenses for which extradition cannot be had under clauses common to most, if not all, extradition treaties to which nations generally are parties.

3. Whether in the construction and application in particular circumstances of a treaty provision common to most, if not all, treaties of a class of treaties to which the United States is, and has been a party, there should be taken into account as an Executive construction thereof, the affirmative measures taken by the United States to bring about an international act, such as the adoption of a resolution by the General Assembly of the United Nations, which evidences and is premised upon an understanding of the Executive as to the construction and application of such provision in such circumstances.

4. Whether the taking of affirmative measures by the United States to bring about the adoption by international bodies of which it is a member, such as the General Assembly of the United Nations, of resolutions calling upon member nations and non-member nations alike, upon demand and the making of a *prima facie* case, to surrender for trial persons charged with the commission of war crimes, as defined by international agreement to which the United States is a party, to the countries in which such crimes were committed, is to be taken as evidencing and being premised upon a construction by the Executive that such war crimes are not offenses of a "political character" for which extradition cannot be had under clauses common to most, if not all, extradition treaties to which the United States is, and has been a party.

5. Whether the indictment of the respondent for murder, duly returned by the County Public Prosecutor of Zagreb, Yugoslavia (R. 464-525) considered in conjunction with the Prosecutor's "Explanation" annexed thereto and facts of which judicial notice was taken, on its face necessarily and as a matter of law, alleges the commission only of offenses "of a political character", expressly excluded by Article VI of the Extradition Treaty of 1901 in force and effect between the United States and Yugoslavia (32 Stat. 1890; II Malloy, *Treaties, Conventions, etc.*, 1622-1625) from the crimes and offenses, including murder, for which extradition may be had under Article II of such Treaty.

6. Whether "that various factions representing different theories of government were struggling for power during this period in Croatia", of which the Courts below purported to take judicial notice, and that respondent was a leader of one such faction, necessarily and as a matter of law, renders the murders, and each of them, alleged in such indictment, offenses "of a political character" in the absence of anything appearing that the victims of such alleged murders, named and described in such indictment, were participants in such "struggle", or partisans of one side to it or another, or were in any way other than peaceful civilians as alleged in such indictment, and in the absence of anything appearing that such "struggle" was an armed struggle or that respondent's alleged victims met their deaths in consequence thereof.

TREATY AND STATUTORY PROVISIONS INVOLVED

The treaty provisions involved are Articles II and VI of the Extradition Treaty of 1901 concluded between the United States and Serbia, 32 Stat. 1890, and currently in force and effect between the United States and Yugoslavia. *Ivancevic* v. *Artukovic*, 211 F. (2d) 565 (9th Cir. 1954), cert. denied 348 U.S. 818, rehearing denied 348 U.S. 889. The statutory provisions involved are the Act of June 25, 1948, c. 645, 646, 62 Stat. 822, 964, 965, as amended May 24, 1949, c. 139, Sec. 112, 63 Stat. 105, the same being Tit. 18 U.S.C. Sec. 3184 and Tit. 28 U.S.C. Secs. 2241 and 2243. The pertinent texts of such treaty and statutory provisions are set forth in App. D, pp. 18a-21a, *infra*.

STATEMENT OF THE CASE

The controversy arises upon respondent's petition for a writ of *habeas corpus* discharging him from the custody of the United States Marshal into which he was taken under a warrant issued by a United States Commissioner pursuant to Tit. 18 U.S.C. Sec. 3184, following the filing of a complaint in extradition against him by the Consul General of Yugoslavia under Tit. 18 U.S.C. Sec. 3184 (R. 8, 13, 17, 18, 22, 92, 378).* The complaint in extradition (R. 405) has attached to it a copy of the indictment returned against the respondent in Yugoslavia (R. 463) including an "Explanation" thereof by the Yugoslav County Public Prosecutor which is annexed thereto (R. 503). The

* All "R." references are to the printed Record prepared for the use of the Court below, nine additional copies of which have been lodged with the Clerk of this Court in accordance with Rule 21(4). The complaint in extradition (actually the amended complaint), the Yugoslav indictment and the "Explanation" are set out in full in Volume II of such Record.

Court below affirmed the granting of the writ and the holding of the District Court that the complaint in extradition was insufficient to vest the Commissioner with jurisdiction on the ground that, considered in conjunction with the "Explanation" annexed thereto and certain facts of which judicial notice was taken, the Yugoslav indictment on its face alleged only offenses of a "political character" which are not extraditable under Article VI of the Treaty.[1] There has been no hearing on the complaint.

The respondent, a citizen of Yugoslavia, entered the United States on July 16, 1948, unlawfully on an Irish certificate of identity and an American temporary visitor's visa, both of which were issued to "Alois Anich" (R. 125, 126) which is not respondent's name. His petition for a readjustment of his status under the Displaced Persons Act of 1948 has been denied, and deportation proceedings are pending against him (R. 122, 123)..

The Yugoslav indictment charges the respondent with murder under the Yugoslav criminal code (R. 500). In the prosecutor's "Explanation" annexed to the indictment, it is said (R. 522):

> The crimes committed by the accused Artukovic simultaneously constitute great international

[1] Article VI of the Treaty, p. 19a, *infra*, has two aspects, denying extradition, first, "if the offense • • • [charged] be of a political character", and second, if the "fugitive • • • proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character". The decisions of the Courts below rest solely on the first of these provisions. It has, moreover, been held that whether extradition is barred by the second provision is a question to be determined exclusively by the Executive, and may not be considered by the Courts. *In re Lincoln*, 228 Fed. 70, 74 (E.D.N.Y. 1915), aff'd 241 U.S. 651; *In re Ezeta*, 62 Fed. 972 (N.D. Cal. 1894).

crimes foreseen by International Law, specifically Law No. X of the Control Council for Germany and by Article 6 of the Statute of the International Military Tribunal.

The indictment (R. 464-500) accuses the respondent specifically of the murder of some 1,293 men, women and children, including infants, whom it names and describes, and refers in general terms to in excess of 200,000 victims. It charges that (R. 464) the respondent:

> * * * in the course of 1941 and 1942, when Yugoslavia was occupied by German and Italian troops, issued orders based on criminal motives, hatred and the desire for power, to members of bands of which he was one of the leaders, to carry out mass mass [sic] slaughters of the peaceful civilian population of Croatia, Bosnia, and Herzegovina, especially women and children, which orders were executed in their entirety, and in this way of having consciously and deliberately ordered and caused the death of thousands of men, women and children—Serbs, Croats, Jewish people, Gypsies and other citizens of Yugoslavia * * *.[2]

From the prosecutor's "Explanation" attached to the indictment, it appears that during the period involved, April 16, 1941—October 10, 1942, the respond-

[2] The charges against respondent are in magnitude and in the quality of alleged victims, reminiscent of those in *Matter of Yamashita*, 327 U.S. 1, 14, 15 (1946) where the accusation involved a "deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batanagas Province * * * as a result of which more than 25,000 men, women and children, all unarmed non-combatant civilians, were brutally mistreated and killed * * *". But that is where the similarity ends, for while the charge here is that respondent affirmatively ordered the mass murders of which he stands accused, Yamashita's guilt was based upon his failure to restrain others.

ent was styled "minister of the interior" in the "cabinet" of one Ante Pavelic (R. 503, 512). It is a matter of history of which courts can properly take judicial notice, that Pavelic was the "poglavnick" or dictator of the so-called "independent state" in Croatia (an integral part of Yugoslavia) which the Germans and Italians purported to establish in the course of the late war during their occupation of Yugoslavia, with an Italian duke as its absentee "king".[3] The existence of this "independent state", so-called, was never recognized by the United States, nor indeed by any country other than its enemies, Germany, Italy, Japan, and their satellites. Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment, 1944) 252.[4]

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[3] See, e.g., Count Galleazo Ciano, *The Ciano Diaries 1939-43* (Doubleday & Co., New York, 1946) 342, 344, 345, 348, 352, 354, 365; Admiral Franco Maugeri, *From the Ashes of Disgrace* (Reynal & Hitchcock, New York, 1948) 94; Joseph Goebbels, *The Goebbels' Diaries* (Doubleday & Co., New York, 1948) 51, 431, 432.

[4] When Yugoslavia was invaded by the Axis forces on April 6, 1941, Secretary of State Hull, in a statement to the press after consultation with the President, characterized the invasion as "barbaric". IV *Bull.*, Dept. of State, April 12, 1941, p. 448. The attitude of the United States with respect to the purported "independent state" in Croatia was reflected by the public statement of Under Secretary of State Welles that he wished "to reiterate the indignation of this Government and the American people at the invasion and mutilation of Yugoslavia by various member states of the Tripartite Pact". IV *Bull.*, Dept. of State, June 7, 1941, p. 683. The Yugoslav government-in-exile which had been promptly established upon the occupation of Yugoslavia by the Germans and Italians was fully recognized by the United States as the government of Yugoslavia and a mutual aid agreement was concluded with it on July 24, 1942. Dept. of State Pub. 1811. Supplies and services were mutually exchanged under such agreement, and in 1948 the present government of Yugoslavia and the United States settled all claims arising thereunder. Dept. of State Press Release 584, July 19, 1948.

The Court below held that by reason of the respondent's membership in the Pavelic "cabinet" at the time of the commission of the alleged murders (disclosed in the prosecutor's "Explanation" annexed to the indictment) and "the fact that various factions representing different theories of government were struggling for power during this period in Croatia" (the taking of judicial notice of which by the District Court the Court below expressly approved) "the offenses for which the surrender of Artukovic [i.e., the respondent herein] was sought were offenses of a political character * * *" (App. B, p. 14a, *infra*). But, the Yugoslav indictment describes the respondent's alleged victims as "peaceful civilian[s]" (R. 464), "peaceful citizens" (R. 465), and "completely innocent citizens" (R. 481), and there is nothing in the indictment, nor elsewhere in the record identifying them with any of the parties to the "struggle" of which the Courts below took judicial notice, or which indicates that such "struggle" was an armed "struggle", or which in any way relates the specific murders with which the respondent stands charged to such "struggle" or to any armed conflict in the course thereof.

The nature of the murders charged in the indictment is, however, clearly discernible. The indictment is divided into eight sections. The first section charges in simple language the murder of one Zimonjic, described as a Bishop of the Greek Orthodox Church (R. 465). The second, third and fourth sections charge the respondent with ordering the murders of "citizens of Serbian nationality" in three areas, naming and describing victims of both sexes and various ages (R. 465, 468, 469). The fifth and sixth sections charge the

respondent with ordering the murder of inhabitants of particular towns and name the victims, both men and women (R. 471). In the seventh section the respondent is accused of ordering the murder of "all citizens of gypsy origin" in three areas, and the victims, men, women and children, are named and described (R. 473). The eighth section appears to be a catchall, charging respondent with ordering the murder of "Croats, Serbs, Jews and other", and naming as among the victims some fifty-eight children ranging from sixteen days to fifteen years of age, a host of women from eighteen to eighty-five years of age whose names fill almost thirteen pages of the record, forty-seven priests of the Serbian Orthodox Church, and forty-eight Jewish rabbis and cantors (R. 481-500).

Such allegations support the statement of the Yugoslav prosecutor in his "Explanation" of the indictment (R. 522) that in addition to being murder under the Yugoslav criminal code, the crimes alleged in the indictment constitute crimes under "Article 6 of the Statute of the International Military Tribunal". This Statute or Charter, as it is elsewhere called, is an international agreement entered into on August 8, 1945, by the United States (acting through the late Mr. Justice Jackson), the United Kingdom (acting through Lord Chancellor Jowitt), France and the Soviet Union (U.N. Pub. Sales No. 1949, V. 7, pp. 89, 92, 93), and accepted by the General Assembly of the United Nations on February 13, 1946 (*U.N. Yearbook, 1946-47*, p. 66), Article 6 of which defines as war criminals those, among others, who committed:

> (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts com-

mitted against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

On February 13, 1946, the General Assembly of the United Nations unanimously adopted the following resolution (*U.N. Yearbook, 1946-47*, p. 66; *Verbatim Record*, U.N. General Assembly, Jan. 10—Feb. 14, 1946, pp. 469, 470, 663, 664):

The General Assembly:

Taking note of the Moscow Declaration of 1 November 1943 by President Roosevelt, Marshal Stalin and Prime Minister Churchill concerning enemy atrocities in the course of the war,[5] and of the declaration by certain Allied Governments of 13 January and 18 December 1942 concerning the same matter;

[5] The Moscow Declaration, also given as of date of October 30, 1943, was a warning to the German government and "those German officers and men and members of the Nazi party who have been responsible for • • • atrocities, massacres and executions" that they would "be sent back to the countries in which their abominable deeds were done" for trial, "without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies". Dept. of State Pub. 2423, p. 3; U.N. Pub. Sales No. 1949. V. 7, pp. 87, 88. The definition of war criminals established by the Agreement of August 8, 1945, is not limited to Germans.

Taking note of the laws and usages of warfare established by the Fourth Hague Convention of 1907;

Taking note of the definition of war crimes and crimes against peace and against humanity contained in the Charter of the International Military Tribunal dated 8 August 1945;

Believing that certain war criminals continue to evade justice in the territories of certain States;

Recommends

That Members of the United Nations forthwith take all the necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in the above crimes, and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries;

And calls upon

The Governments of States which are not Members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries.

This resolution, which originated from a Byelorussian proposal in committee, was drafted by a subcommittee composed of representatives of Luxembourg, Ecuador, the Netherlands, the United Kingdom, Byelorussia and the Ukraine, aided by their legal advisers, and was unanimously recommended by the committee for adoption by the General Assembly (*Verbatim Record, supra*, 663, 664; *Summary Records*, U.N. General Assembly First Committee, Jan. 11—Feb. 12, 1946, pp. 20-23).

On October 31, 1947, the General Assembly of the United Nations adopted a further resolution on the subject (*U.N.Yearbook, 1947-48,* p. 222):

The General Assembly,

Noting what has so far been done in the matter of the surrender and punishment, after due trial, of the war criminals referred to in its resolution adopted on 13 February 1946,

Reaffirms the aforementioned resolution;

Reaffirms also its resolutions on the subject of refugees adopted on 12 February 1946 and on 15 December 1946;

Recommends Members of the United Nations to continue with unabated energy to carry out their responsibilities as regards the surrender and trial of war criminals;

Recommends Members of the United Nations, which desire the surrender of alleged war criminals or traitors (that is to say nationals of any State accused of having violated their national law by treason or active collaboration with the enemy during the war) by other Members in whose jurisdiction they are believed to be, to request such surrender as soon as possible and to support their request with sufficient evidence to establish that a reasonable *prima facie* case exists as to identity and guilt, and

Reasserts that trials of war criminals and traitors, like all other trials, should be governed by the principles of justice, law and evidence.

The following comment with respect to the 1947 resolution appeared in the XVII *Bull.,* Dept. of State, Dec. 14, 1947, at page 1159:

> The General Assembly adopted a United Kingdom resolution, *introduced after discussions with the United States,* noting the accomplishments thus far in the surrender and punishment of war criminals; recommending that members continue to carry out their responsibilities in this regard; stating that members desiring the surrender of war criminals and traitors should request their surrender as soon as possible, with supporting evidence of guilt; and calling for fair trials. (Emphasis supplied.)

The origin and purpose of this resolution appear clearly from President Truman's discussion of it in the *Report by the President to the Congress for the Year 1947* with respect to the activities of the United Nations (Dept. of State Pub. 3024, pp. 80-81), made pursuant to the requirements of Tit. 22 U.S.C. Sec. 287b, in which it is said:

> In February 1946 the General Assembly adopted, on the proposal of Byelorussia, a resolution *regarding the extradition and punishment of war criminals.* In August 1947 Yugoslavia asked the Secretary-General of the United Nations to place on the agenda of the Second Session of the Assembly the question of the recommendations to be made *to insure the surrender of war criminals,* traitors, and quislings to the states where the crimes were committed. This item was referred to the Sixth Committee.
>
> The draft resolution proposed by Yugoslavia, if adopted, would have constituted a finding that certain Members of the United Nations were not carrying out the recommendations of the General Assembly resolution of February 1946. In open debate Yugoslavia made charges against the United States, the United Kingdom and, to a less degree, France, of failure to carry out their obli-

gations with respect to war criminals and quislings. A Soviet amendment was also accompanied by distortions and charges against the United States and the United Kingdom. These charges were emphatically denied by the Delegations of the United States and the United Kingdom. They recalled the steps taken by their Governments and declared their firm intention of prosecuting war criminals. At the same time they insisted that *mere allegations were not sufficient to justify extradition* and that identity and guilt of the persons sought should be adequately established by *prima facie* evidence.

The Assembly approved the report of the Sixth committee on war criminals, *which recommended for adoption a resolution introduced by the United Kingdom after collaboration with the United States.* The resolution notes what has been done thus far in the surrender and punishment of war criminals, recommends that *Members of the United Nations continue to carry out their responsibilities for the surrender of war criminals,* and states that Members desiring such surrender should request it as soon as possible and should support their requests with sufficient evidence to establish that a *prima facie* case exists as to identity and guilt. The requirement as to the *prima facie* evidence constitutes a great forward step. A provision in the resolution that trials of war criminals and traitors, like all other trials, should be governed by the principles of justice, law, and evidence constitutes another great step in upholding the rule of law. (Emphasis supplied.)

Prior to the agreement of August 8, 1945, defining "war criminals", and the adoption of the United Nations resolutions of February 13, 1946, and October 31, 1947, the United States, represented by Secretary of State Stettinius, joined on March 6, 1945, in the adop-

tion of Resolution VI of the Inter-American Conference on Problems of War and Peace, held at Mexico City, which provided (Pan American Union Cong. & Conf. Series No. 47, pp. 27, 28):

WHEREAS:

During the present world war the leaders, as well as numerous officials and military and civilian agents of the Axis powers and their satellites, have committed heinous crimes in violation of the laws of war, of existing treaties, of the rules of International Law, of the penal codes of civilized nations, and of the concepts of civilized life;

Individuals who have committed such crimes may have taken, or may seek, refuge in the territories of the American Republics;

Arrangements should be made to distinguish such criminals from ordinary political refugees,

The Inter-American Conference on Problems of War and Peace

DECLARES:

That the American Republics, faithful to the principles of humanity and law on which their civilization is founded, repudiate war crimes and adhere to the Declaration of October 1943 by Great Britain, the United States of America and the Soviet Union to the effect that persons guilty of, responsible for, and accomplices in the commission of such crimes, shall be tried and sentenced; and, therefore,

RESOLVES:

1. To recommend that the Governments of the American Republics do not give refuge to individuals guilty of, responsible for, or accomplices in, the commission of such crimes.

2. To recommend that the Governments of the American Republics, upon the demand of any of the United Nations and in accordance with the procedure set forth in the following paragraph, surrender individuals accused of such crimes to the United Nation making the request, or to the custody of the agency of the United Nations that may be established for the trial and punishment of such criminals.

3. To request that the Inter-American Juridical Committee, keeping in mind the respective national legislation on the subject, prepare and submit for adoption by the Governments of the American Republics, the standards needed for determining the status of war criminals, as well as the procedure to be followed for the return or delivery of such criminals.[6]

The Court below held (App. B, p. 16a, *infra*) that the foregoing international acts and engagements were without consequence in construing Article VI of the Treaty on the ground that they did "not [have] sufficient force of law to modify long standing judicial interpretations of similar treaty provisions". But the Court below cited no such "judicial interpretations", and it is commonplace that materials of many kinds, not having any force as law, are properly to be accorded weight in construing a treaty.

* * *

[6] No such standards or procedures were promulgated. Presumably it was concluded that the definition of "war criminal" subsequently adopted on August 8, 1945, by agreement between the United States, the United Kingdom, France and the Soviet Union, and approved by the United Nations, *supra*, pp. 10, 11 and the procedures prescribed by the February 13, 1946, and October 31, 1947, resolutions of the United Nations, *supra*, pp. 11-13, made unnecessary any special standards or procedures for the American republics.

The questions posed by this petition are of the gravest importance. They involve not only the construction and application of Article VI of the Treaty, the substance of which is common to most, if not all, of the extradition treaties to which the United States is or has been a party,[7] but also the credit attaching to solemn international acts of the United States. But perhaps of even deeper significance, is whether, notwithstanding the profoundly humanitarian concern which, since long prior to the negotiation of the Treaty here involved, the United States has traditionally and invariably shown for the fate of racial and national minorities subjected to exterminatory practices by their oppressors,[8] the extradition of one formally accused of the commission of such crimes will be refused on the ground that the offenses charged are of a "political character". The holding of the Court below

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[7] II Hyde, *International Law* (2d Rev. Ed., 1951) 1020.

[8] See, e.g., H. Res., January 30, 1882 (13 *Cong. Rec.* 645, 738, 47th Cong., 1st Sess.); H. Res., August 20, 1890 (21 *Cong. Rec.* 8882, 51st Cong., 1st Sess.); S. Res. 107, December 3, 1894 (27 *Cong Rec.* 12, 53rd Cong., 3rd Sess.); S. Res. December 4, 1895 (28 *Cong. Rec.* 36, 54th Cong., 1st Sess.); Chester A. Arthur, *Second Annual Message to the Congress*, December 4, 1882, VI *Messages and Papers of the Presidents* (1912 ed.) 4713, 4714; Benjamin Harrison, *Third Annual Message to the Congress*, December 9, 1891, VIII *id.* 5615, 5623; Grover Cleveland, *Fourth Annual Message to the Congress*, December 7, 1896, VIII *id.* 6146, 6147. See also (1872) *Foreign Relations of the United States* (Govt. Printing Office, 1873) 493-5, 497-503, 55, 62, 183, 184, 193, 194, 196, 197, 319, 320, 652-56, 678-698; (1882) *id.* (Govt. Printing Office, 1883) 446, 451, 452, 454, 516-520; (1890) *id.* (Govt. Printing Office, 1891) 701; (1894) *id.* (Govt. Printing Office, 1895) 525-536; II (1895) *id.* (Govt. Printing Office, 1896) 1255-1266, 1318 *et seq.*; (1902) *id.* (Govt. Printing Office, 1903) 42, 420, 442, 549, 684, 936, 1048. See also, Executive Order 9417, January 22, 1944, 9 F.R. 935.

is, in effect, that the Turks who at the turn of the century ordered what President Cleveland formally condemned as the "bloody butchery of men, women and children"[9] solely because they were Armenians, and those who in Czarist days similarly brought about the pogroms in Russia of hapless Jews, only because they were Jews,[10] were "political" offenders whose extradition to Turkey or Russia to stand trial for their unspeakable crimes would have been necessarily denied had they escaped to our shores.[11]

The case is one of first impression, for never before has an alleged perpetrator of such crimes sought refuge here and become the object of extradition proceedings. On the other hand, that this *might* happen was not altogether unforeseen. It was, as already noted, the subject of careful consideration in 1945 at the Inter-American Conference on Problems of War and Peace, and again in 1946 and 1947 in the General Assembly of the United Nations, with resultant solemn international acts, to which the United States was a party, plainly calculated to assure members of the United Nations, including Yugoslavia, that members of the United Nations, including the United States, would

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[9] Grover Cleveland, *loc. cit. supra*, n. 8.

[10] See, (1903) *Foreign Relations of the United States* (Govt. Printing Office, 1904) 712; Luzzatti, *God in Freedom* (Macmillan, 1930) 712, 713, citing *Termination of the Treaty of 1832 between the United States and Russia—Hearing before the Committee on Foreign Affairs of the House of Representatives, December 11, 1911* (Rev. Ed.) p. 313.

[11] Article III of the Extradition Treaty of 1874 with Turkey, II Malloy, *Treaties, Conventions, etc.*, 1341, 1342, and Article III of the Extradition Treaty of 1887 with Russia, *id.* 1527, 1528, like Article VI of the Treaty here involved, expressly exclude offenses of a "political character" as a basis for extradition.

upon proper demand surrender just such alleged malefactors as respondent, for trial in the countries where atrocious crimes of the kind here involved were committed.

REASONS FOR GRANTING THE WRIT

1. In holding that resolutions of international bodies, concurred in by the United States and having pertinency to the construction and application in particular circumstances of a treaty provision common to most, if not all, treaties of a class to which nations generally, including the United States, are parties, are not to be considered in construing and applying such a treaty provision in such circumstances, the Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

The Court below (App. B, p. 16a, *infra*) dismissed the international acts to which the United States was thus a party as "not [having] sufficient force of law to modify long standing judicial interpretations of similar treaty provisions", i.e., similar to the provisions of Article VI of the Treaty with which we are here concerned (App. D, pp. 18a-20a, *infra*). It is not clear what "judicial interpretations" the Court below had in mind, for it refers to none, and, as the discussion below more fully develops, insofar as the interpretation of similar treaty provisions is concerned, none of the cases cited in the opinion below has even the most remote relevance to the case at bar. See *infra*, pp. 40-44.

The vital role of the United Nations and of regional organizations of states within the purview of its Charter, in the solution of international problems of the gravest consequence to this as well as to other nations, renders it essential that this Court settle, as a matter of federal law, whether resolutions of the General Assembly of the United Nations, such as those of February 13, 1946, and October 31, 1947, the former unani-

nously adopted, and the latter fostered by the United States in the manner and circumstances, and for the purposes plainly stated by the President in his *Report to the Congress, supra,* pp. 14, 15, are or are not to be given effect in the interpretation of the provisions of a treaty to which they are clearly pertinent.

It need not be urged, and it is not, that these or any other resolutions of the General Assembly of the United Nations have force and effect *as law*. It is, however, urged that when the family of nations, acting formally, adopts resolutions such as these, premised necessarily upon a general understanding among them as to the meaning and effect of a type of provision common to treaties of a class to which they are parties, such resolutions should be taken into account, and accorded great weight in construing and applying a provision of that type contained in any treaty in that class.

The pertinency of the resolutions is manifest. The resolutions call upon each member of the United Nations, as well as non-members, upon the demand of a member and the making of a *prima facie* case, to surrender for trial to the country where war crimes as defined by the Agreement of August 8, 1945, were committed, persons charged with the commission of such crimes. Yet, the Court below has held that the demand for respondent which charges him with crimes clearly within the definition of war crimes contained in the Agreement of August 8, 1945, is, as a matter of law, insufficient on its face as charging only offenses of a "political character" within the meaning of Article VI of the Treaty. But the provisions of that Article, excluding offenses of a "political character" from extraditable offenses are not unique. Nor are such pro-

visions common merely to extradition treaties to which the United States is a party. On the contrary, provisions of this kind, in one form or another, are well-nigh universal in extradition treaties between nations generally, and in national statutes governing extradition. Thus, in the comment on the "political offense" clause of a proposed international convention on extradition, it is said in Harvard Research in International Law, Pt. 1, *Extradition,* (1935) 29 Am. J. Int. L. Supp., 107, 108, 109, 110:

> The provision contained in this paragraph is based on the political character of the act, and is in conformity with a principle now accepted generally in theory by the majority of text-writers and universally in the practice of States as manifested in their treaties. Extradition treaties concluded in the past hundred years, with few exceptions, and all multipartite conventions and drafts contain a provision exempting, in mandatory or in permissive form and subject to various limitations, political offenses from their operation. A great number of the national extradition statutes similarly provide for the non-extradition of persons accused of offenses of a political character.
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> * * *
>
> * * * the great majority of treaties and draft conventions examined contain provisions phrased, in mandatory form either precluding the requested State from surrendering a person sought for a political offense, or enjoining the requesting State from seeking the extradition of a person accused of a political offense. * * *
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> * * *
>
> It may be mentioned that the majority of the national extradition statutes also use the mandatory form in precluding the extradition of persons charged with political offenses. * * *

Obviously, the members of the United Nations, including the United States, must have been well aware of this almost uniform pattern of excluding political offenses from offenses extraditable under treaties to which they were parties. Nevertheless, they called upon one another, the United States included, and non-members as well, to surrender alleged war criminals, when demand was made and a *prima facie* case established. Certainly, the premise underlying such resolutions was that the "political offense" clauses in treaties to which they, including the United States, were parties, and similar provisions in their statutes, did not bar the extradition of those charged with war crimes as defined by the Agreement of August 8, 1945, *supra*, pp. 10-11.

This appears clearly from the circumstance, emphasized by the President in his *Report to the Congress*, *supra*, pp. 14-15, that the resolution adopted October 31, 1947, was proposed by the United Kingdom in collaboration with the United States, in opposition to a resolution proposed by Yugoslavia, and that Section 6 of Yugoslavia's defeated proposal (*U. N. Yearbook, 1946-47*, pp. 220-221) contained a provision not mentioned by the President and not to be found in the successful Anglo-American proposal, which would have had the United Nations call upon its members

> to conclude bilateral conventions for the extradition of war criminals and quislings and to implement such conventions scrupulously.

Furthermore, it must be apparent from the President's *Report to the Congress*, *supra*, pp. 14-15, in which he describes both the 1946 and 1947 resolutions of the United Nations as relating to the extradition of war criminals, that in opposing the resolution

proposed by Yugoslavia, substantively upon the ground "that mere allegations were not sufficient to justify extradition and that identity and guilt of the persons sought should be adequately established by *prima facie* evidence", which, as the President points out, was required by the resolution supported by the United States and adopted, the United States, and the United Nations in adopting it, took the position that compliance with such conditions would result in extradition. It must also be clear that it was the position of the members of the United Nations, including the United States, that new extradition treaties were not necessary to effect the extradition of war criminals, for the resolution adopted with the support of the United States contains no provision comparable to Section 6 of the resolution proposed by Yugoslavia. This inescapable inference finds further support in the circumstance that even before Yugoslavia did, the United Nations War Crimes Commission[12] suggested the adoption of a multilateral convention between its members with respect to the surrender of war criminals, a principal purpose of which was to "exclude the possibility of the refusal of surrender on the ground that the acts charged had the character of political offences". Schwelb, *United Nations War Crimes Commission*, (1946) XXIII Br. Y.B. Int. L. 363, 372. But no such convention materialized because "some members, particularly the Great Powers, maintained * * * there was no need for treaty provisions".

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[12] An organ or agency of the United Nations, the members of which were: Australia, Belgium, Canada, China, Czechoslovakia, Denmark, France, Greece, India, Luxembourg, the Netherlands, Norway, New Zealand, Poland, the United Kingdom, the United States and Yugoslavia. See Schwelb, *op. cit. infra* in the text.

Schwelb, *loc. cit. supra.*[13] And, in his report to the President as American representative on the War Crimes Commission, Mr. Justice Jackson said (Jackson, *Atrocities and War Crimes*, XII *Bull.*, Dept. of State, June 10, 1945, pp. 1071-2):

> A second class of offenders, the prosecution of which will not interfere with the major case, consists of those who, under the Moscow Declaration, are to be sent back to the scene of their crimes for trial by local authorities. * * * *The part of the United States in these cases consists of the identification of offenders and the surrender on demand of those who are within our control.* (Emphasis supplied.)

That this was the position of the United States finds further support in the fact that in the summer of 1944, if indeed not earlier, the United States called upon all neutral nations to refuse asylum to, and to surrender those charged with war crimes. See, *War Crimes and Punishment of War Criminals* (U.N. Information Organization) p. 23; II Oppenheim, *International Law* (7th ed., 1952) 588, 589. Nor was there

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[13] The author, who was legal officer of the Commission, does not identify the "Great Powers". In view of the illegal nature of respondent's entry and continued presence in the United States, *supra*, p. 6, it is interesting to note that the reason attributed to the unidentified "Great Powers" for their attitude towards the proposal for a multilateral convention was that any alleged war criminals would of necessity either "be prisoners of war in the hands of the armed forces of the requested state, or refugees present in its territory without legal authorization * * *." See Schwelb, *loc. cit. supra*. It will be noted, however, that this was not among the reasons given by the President, *supra*, pp. 14-15, for American and British opposition to the resolution proposed by Yugoslavia, and American and British sponsorship of the substitute proposal which became the resolution of October 31, 1947, *supra*, p. 13.

any suggestion that existing extradition treaties be amended or superseded.

Any suggestion that the resolutions of the General Assembly of the United Nations related only to alleged war criminals found in occupied enemy territory, who presumably could be dealt with summarily by the military, is manifestly untenable. Thus, the resolution of October 31, 1947, *supra*, p. 13, specifically reaffirmed the prior resolution of February 13, 1946, *supra*, pp. 11-12, which called upon not only members of the United Nations but

> The Governments of States which are not members of the United Nations also to take all necessary measures for the apprehension of such [i.e., war] criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries.

Is it conceivable that while thus asking neutral nations[14] to surrender alleged war criminals seeking asylum in their countries, the members of the United Nations were themselves prepared to surrender only suspects found in occupied enemy territory, and intended to give refuge to those who might reach their own territories? Of course not, and the resolution adopted by the American republics on March 6, 1945, at the Inter-American Conference on Problems of War and Peace, *supra*, pp. 15-17, makes it plain that certainly the American republics, including the United States, had no such thought in mind.

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[14] Other than the occupied enemy countries, the neutral nations were at the time the only non-members of the United Nations.

There is, moreover, other evidence that in adopting the resolutions of February 13, 1946, and October 31, 1947, *extradition*, not merely summary military action, was intended, and that the generally accepted limitations on extradition were well in mind. Thus, as already noted, in his *Report to the Congress, supra*, pp. 14-15, the President referred to both resolutions as relating to *extradition*. And, although the 1946 resolution went through the committee and the General Assembly without debate or dissent, there was some, although very little, discussion of it in committee, which the Chinese delegate summed up in committee without disagreement as follows (*Summary Records*, U.N. General Assembly First Committee, Jan. 11-Feb. 12, 1946, p. 22):

> * * * there was no doubt amongst all members that war crimes should be punished and war criminals extradited.

In the committee discussions on the 1947 resolution the British representative said (*Summary Records*, U.N. General Assembly Sixth Committee, Sept. 16-Nov. 26, 1947, p. 60) that

> It was the intention of the United Kingdom Government that war criminals against whom a real *prima facie* case had been made out should be extradited * * *.

And again (*id.*, p. 65) that

> Extradition would be granted, provided that a *prima facie* case had been established * * *.

The Ukraine representative, *id.*, p. 61, "recalled the resolution of the General Assembly of last year concerning the extradition * * * of war criminals * * *".

while the Czech representative made clearly meaningful the use of the term "extradition", by arguing (*id.*, p. 68) that since it was not used in the Moscow Declaration, *supra*, n. 5, p. 11, what was "envisaged [was] the handing over of war criminals without formalities inherent to the classical sense of the word 'extradition'.". Nevertheless, the Russian representative referred (*id.*, p. 72) to unfulfilled "requests for extradition of war criminals" and the Yugoslav representative, recognizing a distinction between traitors and quislings, on the one hand, and war criminals on the other (*id.*, pp. 73, 74) insisted that as to "the extradition of war criminals there remained no question". The Norwegian representative (*id.*, p. 76) "fully supported the principle of extradition of war criminals" but "did not think it was necessary to repeat the General Assembly resolution of the previous year".

The Swedish representative, like the Czech, made the meaning of the discussions unmistakable when he said (*id.*, p. 76) that "Sweden had no intention to shield war criminals. * * * but it reserved its right to apply to eventual cases its own legislation on extradition". Somewhat similarly, the Turkish representative, in supporting the British proposal observed (*id.*, p. 88) that "extradition should be carried out in accordance with both international and national legislation * * * and reserved the competence of national legislation in this matter", while the Argentine representative, also supporting the British proposal, made it plain (*id.*, p. 89) that "extradition laws in Argentina were based on the Constitution and must therefore be applied".

The United States representative was present, and although he entered the discussion from time to time, on no occasion did he, in committee or in the debate that followed in the General Assembly, indicate, directly or indirectly, that only summary military action, and not extradition in the classical sense, was involved, or that "war criminals" might be considered "political offenders" under treaties to which the United States was a party (*id.*, pp. 59, 66, 67, 77, 78, 88, 89; *Verbatim Record*, U.N. General Assembly, October 31, 1947; A.M., pp. 161-211). This silence is particularly significant in view of the reference in committee by the Colombian representative (*Summary Records, supra*, p. 84) to both the United Nations and Pan American resolutions as being in regard "to the extradition * * * of war criminals," and the statement of the Salvadorean delegate in the debate in the General Assembly (*Verbatim Record, supra*, A.M., pp. 32, 33) that:

> We feel that the extradition of war criminals should, of course, be granted, but that it is necessary for the government which is asked to surrender the criminals to have an opportunity to consider the evidence of the guilt of the persons named, and that it is also necessary that complete proof be submitted in regard to the identity of such persons. Without the fulfillment of those two conditions, we feel that no government is really entitled, from the point of view of human justice, to surrender any person who is claimed as a war criminal.
>
> In the constitutions of most of the Republics of America, there is a provision to the effect that two conditions must be met if extradition of any criminal is to be granted. First, the person must be responsible for the commission of a common

crime: that is, a crime which carries a penalty in the penal code of the country which is asked to extradite the person. There is a difference, as we all know, between common crimes and political crimes. I believe that, according to the provisions of the constitutions of most of the American Republics, no political criminal, so regarded by the government making the claim, is to be surrendered. The second condition which has to be met is that there must be submitted to the government receiving the claim evidence that the crime has really been committed and that the person named is really responsible for it.

As I have said, we find in the resolution presented by the delegation of Yugoslavia nothing which requires the presentation of any evidence. We are therefore definitely opposed to that resolution.

As regards the proposition submitted by the United Kingdom delegation, we feel that even that proposition is weak in one respect: it requires only *prima facie* evidence of guilt. We feel that substantial evidence should be required. Therefore, when we come to a discussion of the United Kingdom proposal, the delegation of El Salvador will move that the words "prima facie", in the next-to-the-last paragraph, be deleted from the text.

In view of the express exclusion of offenses of a "political character" from the categories of extraditable crimes under practically all, if not all, extradition treaties to which members of the United Nations, including the United States, are parties, the adoption of the resolutions of February 13, 1946 and October 31, 1947, *supra*, pp. 11-12, 13, necessarily presupposes a recognition that a distinction exists between war criminals and ordinary political offenders. Indeed, such a

distinction was expressly made in the preamble of the March 6, 1945, resolution of the Inter-American Conference on Problems of War and Peace, *supra*, p. 16. Similarly, in a resolution adopted on February 12, 1946 (*U.N. Yearbook, 1946-47*, pp. 74, 75), and expressly reaffirmed by the resolution of October 31, 1947, the General Assembly of the United Nations in so many words recognized the "necessity of clearly distinguishing between genuine refugees * * *, on the one hand, and * * * war criminals * * * on the other". Certainly, such a distinction was well in mind when the resolution of October 31, 1947, was considered and adopted, for it was implicit in the committee discussions reviewed above, and was clearly made by the Salvadorean delegate in the General Assembly debate.

Moreover, the United States member of the Sixth Committee, which considered and reported favorably the Anglo-American proposal which eventually became the resolution of October 31, 1947, both in an address to the Second Committee and in the debate in the General Assembly, said in support of the Anglo-American proposal and in refuting the Yugoslav claim reflected in the resolution proposed by Yugoslavia, that certain countries, including the United States, were not fully complying with the resolution of February 13, 1946 (State Dept. Pub. 3024, pp. 313-316; *Verbatim Record*, *supra*, A.M., pp. 161, 162 170, 171, 172 180, 181, 182 190):

> The United States supports the resolution favorably reported by the Sixth Committee, where the matter was considered at great length. The resolution of the Committee was adopted as a substitute for a resolution proposed by Yugoslavia in the Committee—and now proposed again here—

which was rejected by an overwhelming vote. The vice of the Yugoslav resolution was that it would have constituted a finding that certain Member states were not carrying out the recommendations previously made by the General Assembly on this subject.

In opening the debate and in continuing it in the Committee, the proponents of the resolution attacked the United States, the United Kingdom, and France * * * charging these nations with failure to carry out their obligations with respect to war criminals and quislings.

* * *

To have approved the Yugoslav resolution, particularly in the context of the debate would have been—and would be now—gross injustice. * * *

In order, however, that it might not be thought that the action of the Committee in any way tempered previous resolutions of the General Assembly calling for the punishment of war criminals and in order further to set down again certain criteria in connection with that [sic] surrender, the Sixth Committee * * * approved the resolution * * * which notes the steps already taken regarding war criminals, reaffirms the resolutions of the General Assembly of February 13, 1946 * * * of February 12, 1946, and of December 15 last.

The resolution now before us also recommends energetic continuation of the carrying out of responsibilities for the surrender and trial of war criminals. It further recommends that members of the United Nations who desire such surrender * * * should make their requests as soon as possible * * * that they support such requests with sufficient evidence to establish that a reasonable *prima facie* case exists * * *.

* * *

I feel obliged to give you * * * the reasons for the rejection in the Committee of the Yugoslav

resolution and the approval of the United Kingdom resolution. The reasons are that, rather than protecting war criminals as is charged, the Government of the United States took leadership in their punishment. * * *

* * *

We have surrendered to Yugoslovia, Poland, Czechoslovakia, the Soviet Union, Belgium, and the United Kingdom, in the aggregate, many hundreds of persons desired by them for trial. * * *

* * *

Therefore, to have acceded to the reckless and unfounded charge of failure on our part to fulfill our responsibility regarding war criminals would have been a distortion of history, including current history * * *.

It was said in Committee and, to some extent, repeated here this morning that in the case of particular individuals, we have not always surrendered as requested. That is true. It is true for the reason that often the request has not been accompanied by evidence even as to the identity of the individual or a reasonable evidentiary basis for surrender * * *.

* * *

In this connection, the United States surrenders no one for trial as a war criminal who we believe from the evidence is wanted simply as a political opponent of the government making the request and where evidence of complicity in crime is lacking. In our own country and elsewhere, we recognize the fundamental right of political opposition to the government in power. Such opposition standing alone cannot make a person a war criminal or a quisling or a traitor.

The membership of the United States in the United Nations and its participation in its deliberations and

decisions is no idle pursuit by the Executive of academic studies in the field of international politics, nor merely to afford opportunities for the exercise and improvement of forensic abilities. The Charter of the United Nations was ratified by the Senate as a treaty, 59 Stat. 1031, and United States participation in its affairs is governed by the United Nations Participation Act of 1945, 59 Stat. 619, as amended, Tit. 22 U.S.C. Sec. 287 *et seq.* Thus, the President is by law authorized to appoint the representatives of the United States in the United Nations General Assembly and in organs and agencies of the United Nations, Tit. 22 U.S.C. Sec. 287, subsecs. (c) and (d), and such representatives are required by law, Tit. 22 U.S.C. Sec. 287(a)

> at all times, [to] act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President, and * * * in accordance with such instructions, [to] cast any and all votes under the Charter of the United Nations.

Furthermore, the President is required by law, Tit. 22 U.S.C. Sec. 287(b)

> not less than once each year, [to] make reports to the Congress of the activities of the United Nations and of the participation of the United States therein * * *.

It was pursuant to this requirement that the President made his Report to the Congress, *supra*, pp. 14-15, concerning the General Assembly's adoption of the resolution of October 31, 1947, *supra*, p. 13, and the participation of the United States therein.

In these circumstances, it would seem to appear that this Court should settle the question, heretofore not passed on by it, whether formal international acts, such as resolutions, of the United Nations, participated in by the United States in the manner and circumstances and to the extent here present, are of sufficient force to be considered and given weight in construing and applying the provisions of a treaty to which such acts have obvious pertinence. *Cf. Oyama* v. *California*, 332 U.S. 633, 649-50, 673 (1948).

2. The international acts to which the United States was thus a party necessarily imply an Executive construction of treaty provisions such as are here under consideration, and in failing to give them any consideration in the construction of such provisions the Court below decided a federal question in a way in conflict with applicable decisions of this Court. Contrary to the opinion of the Court below, there are no "long standing judicial interpretations of similar treaty provisions" in conflict with what was necessarily the Executive interpretation.

It is fundamental, as this Court said in *Sullivan* v. *Kidd*, 254 U.S. 433, 442 (1921), that

> While the question of the construction of treaties is judicial in its nature, and courts, when called upon to act, should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the government, charged with the supervision of our foreign relations, should be given much weight * * *.

See also, *Dainese* v. *Hale*, 91 U.S. 13 (1875); *Charlton* v. *Kelly*, 229 U.S. 447 (1913); *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933). And, as the Court below, on another occasion, said in *United States* v. *Reid*, 73 F. (2d) 153, 156 (1934), cert. denied 299 U.S. 544:

> This rule would apply with even more cogency where the state department is negotiating with the other treaty-making power concerning the meaning and effect of a treaty, and during such negotiations insists upon a not unreasonable construction of its terms which is acquiesced in by the other power.

This would not only appear, under all of the circumstances, to be particularly true here, but should be especially applicable in the case of extradition treaties where, although foreign policy is "wholly confided by our Constitution to the political departments of the government, Executive and Legislative", *Chicago and Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948), the application of such treaties is by law committed to the judiciary. Tit. 18 U.S.C. Sec. 3184.

There is, it would seem clear, necessarily inherent in the participation of the United States in the international acts under the circumstances, both above described, either a construction, or what is tantamount to a construction, by the Executive branch that war criminals were extraditable as such under existing treaties. For, having in mind that in "almost all the extradition treaties to which the United States has been a party there is a provision expressly declaring that persons charged with the commission of political offenses shall not be surrendered," II Hyde, *International Law* (2d Rev. Ed. 1951) 1020, the participation of the United States in the Inter-American Conference resolution of March 6, 1945, *supra*, pp. 15-17, and in the sponsorship of the United Nations resolution of October 31, 1947, *supra*, p. 13, is otherwise inexplicable. Moreover, as we have seen, both resolu-

tions were premised on there being a distinction between "war criminals" and "ordinary political refugees".

Furthermore, in the light of the special circumstances which gave rise to United States collaboration with the United Kingdom in the sponsorship of such resolution, as described in detail by the President in his *Report to the Congress, supra*, pp. 14-15, and the statement of the American representative in the General Assembly, *supra*, pp. 31-33, there is no escaping the conclusion that the Executive branch must have had specifically in mind the provisions of the extradition treaties such as that in force and effect between the United States and Yugoslavia. For, if "war criminals" were necessarily "political" offenders, not extraditable under such a treaty in any event, there could have been no purpose in the United States collaborating in the sponsorship of a substitute resolution for that offered by Yugoslavia, and insisting, as the President reported to the Congress, *supra*, p. 15, "that mere allegations were not sufficient to justify *extradition* and the identity and guilt of the persons sought should be adequately established by *prima facie* evidence." The insistence on this "great forward step", as the President called it in his statutory report, is consistent only with the view that with the fulfillment of these requirements (which in general terms coincide with the statutory requirements of Tit. 18 U.S.C. Sec. 3184), alleged "war criminals" would be extraditable under treaty provisions such as here under consideration. And, unless the Executive branch construed the "offense of a political character" clauses in existing treaties as not barring the extradition of war criminals as defined by the Agree-

ment of August 8, 1945, *supra*, pp. 10-11, to which the United States was a party, there would appear to be no reason why there should have been omitted from the resolution it supported, a provision such as the sixth section of the resolution proposed by Yugoslavia, *supra*, p. 23, calling for the conclusion of special bilateral conventions for the extradition of alleged war criminals.

It cannot be gainsaid that as history goes, this construction has not been of long duration. But the concern of the United States with war crimes and the surrender for trial of alleged war criminals, as such, did not arise until its entry into the War in December, 1941, and the earliest Allied pronouncement on these subjects was the Roosevelt-Churchill-Stalin Moscow Declaration of October 30-November 1, 1943, *supra*, p. 11. An Executive construction of existing treaties as not barring the extradition of war criminals, would appear to date from 1944, or perhaps somewhat earlier, when the United States first called upon neutral nations to surrender fugitive war criminals, *supra*, p. 25. Moreover, that construction was, as we have seen, consistently adhered to by the Executive branch when the adoption of measures to assure the return of fugitive war criminals to the scenes of their crimes for trial was under international consideration, as at the Inter-American Conference in March, 1945, *supra*, pp. 15-17, and the General Assembly of the United Nations in February, 1946, and October, 1947, *supra*, pp. 11-12, 13, and was necessarily the premise upon which the United States played the leading role in securing in the United Nations the adoption of the latter over the Yugoslav proposal. Such a construction in such circumstances is entitled to the great-

est of weight, not lessened because it is inferential rather than express. Thus, in *Pigeon River Improvement, Slide, & Boom Company* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 160, 161 (1934), this Court said:

> We think that it is proper to infer that the Congress, in view of the condition of the stream and the purpose of the improvements, did not consider the authority to make them and to impose a reasonable charge for their use, as being inconsistent with the treaty stipulation. We regard the action of the Congress, following that of the State, as a practical construction of the treaty as permitting these works and justifying the charge.
>
> The same may be said of the action of the Province of Ontario in providing for the complementary works on the Canadian side of the boundary and authorizing tolls for their use.

Nor is this a case like *Clark* v. *Allen*, 331 U.S. 503 (1947), where the precise language used in the treaty provisions under consideration had been for some eighty-seven years uniformly construed by the courts in a number of cases under different treaties, in precisely the situation there presented; and this Court declined to depart from such judicial construction even in the face of clear proof, then for the first time presented, that when the Executive first used the language in question, it was intended to mean something quite different. For here, notwithstanding the assertion of the Court below (App. B., p. 16a, *infra*), there are no "long standing judicial interpretations of similar treaty provisions" contrary to the Executive interpretation inherent in the international acts participated in by the United States in the circumstances described. The Court below cites no such interpretations in support of its statement, counsel have been able to find

none, and none of the cases cited by the Court below as dealing with "offense of a political character" clauses in extradition treaties is such an interpretation.

The cases cited by the Court below (App. B., pp. 9a-12a, *infra*) as being in this category are *In re Castioni*, [1891] 1 Q.B. 149; *In re Ezeta*, 62 Fed. 972 (N.D. Cal. 1894); *Ornelas* v. *Ruiz*, 161 U.S. 502 (1896); *Luis Oteiza y Cortes* v. *Jacobus*, 136 U.S. 330 (1890); *U. S. ex rel. Giletti* v. *Commissioner*, 35 F. (2d) 687 (2d Cir. 1929); and *Ex parte Kolczynski*, [1955] 1 Q.B. 540. In the *Castioni* case, the facts, as summarized by the Court in the *Ezeta* case, 62 Fed. at 998, were these:

> * * * Castioni was charged with the murder of one Rossi, by shooting him with a revolver in Switzerland. The deceased, Rossi, was a member of the state council of the canton of Ticino. Castioni was a citizen of the same canton. For some time previous to the murder, much dissatisfaction had been felt and expressed by a large number of inhabitants of Ticino at the mode in which the political party then in power were conducting the government of the canton. A request was presented to the government for a revision of the constitution of the canton, and, the government having declined to take a popular vote on that question, a number of the citizens of Bellinzona, among whom was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested and bound or handcuffed several persons connected with the government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the government, who were in the palace. The crowd then broke open the outer

> gate of the palace and rushed in, pushing before them the government officials whom they had arrested and bound. Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. * * * Castioni fled to England. His extradition was requested by the federal council of Switzerland.

It was held, on a showing of these facts, that Castioni's crime was an offense of a "political character". Conversely, in the *Ezeta* case, it was held that the killing of others by the president of a Latin-American republic and his associates in the course and for the purpose of putting down an armed rebellion against their government, in which the rebels were successful, was of such a "political character" as to preclude their extradition therefor. But there is nothing in the record here from which it can be concluded, that the murders laid to the respondent were committed *in the course and for the purpose of* suppressing or furthering a rebellion, even if it should be assumed that, as the Courts below purported judicially to notice (App. B., p. 14a, *infra*), "various factions representing different theories of government were struggling for power during this period in Croatia". Accordingly, while, as we shall later point out, these cases have a pertinence to this case in another connection, neither the *Castioni* case nor the *Ezeta* case is apposite as a construction of the "offense of a political character" clause in the circumstances here present.

The same is true of *Ornelas* v. *Ruiz*. There it was claimed that the crimes charged were offenses of a "political character", and proof was produced at the

hearing that at the time of their commission in Mexico, an armed rebellion was in progress against the government of that country, that the prisoners were partisans of the rebels and that their purpose was to "fight against the government". Indeed, the crimes alleged involved an attack on a detachment of Mexican government troops, the slaying of some, the capturing of others, the burning of their barracks, and the capture and destruction of their military equipment, as well as similar depredations committed on civilians and civilian property. At the conclusion of the hearing, the prisoners were held for extradition by a commissioner. A writ of *habeas corpus* releasng them was thereafter issued by a district court on the ground that the alleged offenses were of a "political character". In reversing the granting of the writ, this Court said, 161 U.S. at 511, 512:

> Can it be said that the commissioner had no choice on the evidence but to hold, in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed, that this was a movement in aid of a political revolt, an insurrection or a civil war, and that acts which contained all the characteristics of crimes under the ordinary law were exempt from extradition because of the political intentions of those who committed them? In our opinion this inquiry must be answered in the negative.

The *Luis Oteiza y Cortes* case is entirely irrelevant, for although it arose upon a *habeas corpus* petition of a prisoner held for extradition under a treaty, no question under the "offense of a political character" clause was involved or considered. The *Giletti* case is equally irrelevant. That was a *deportation*, not an

extradition case, and the relator sought by *habeas corpus* to avoid being deported to his native country on the ground that he faced prosecution there for illegal political activities prior to his immigration to the United States. The Court affirmed the dismissal of the writ on the grounds that the relator was properly deportable to the country of which he was a citizen as an alien who had been convicted here of crime and who had neither secured permission to enter any other country, nor shown that he could himself pay the expenses of transportation to any such country, if there should be one. In the course of its opinion, the Court said, 35 F. (2d) at 689:

> The record does show that by his conduct here he has apparently exposed himself to criminal prosecution in Italy, for which he is subject to an imprisonment of between 5 and 15 years. His offenses are apparently political, for which he could not be extradited.

What the relator's offenses in Italy were, the Court did not disclose and that case appears clearly not to be an interpretation of any "offense of a political character" clause, to which the Executive interpretation inherent in the United States' participation in the international acts above-described is contrary.

Nor is *Ex parte Kolczynski* such an interpretation. In that case the extradition of Polish seamen was sought for offenses committed in the furtherance of a successful mutiny at sea which ended in the seamen bringing their Polish-flag ship to port in England. At the hearing there was evidence that the prisoners mutinied and brought their ship to England because they had observed the "party secretary" aboard their ship (whose function it was to exercise supervision

over the crew's political leanings) overhearing and recording their conversations, and because they had good reason to believe that he was doing so for the purpose of preparing a case against them on account of their political opinions, for presentation when they returned to Poland. There was also evidence that while in England they had received vilifying letters purporting to come from relatives in Poland (which the prisoners denied they did) in effect charging them with being traitors, etc. It was held unanimously that the prisoners were not extraditable. One justice, under an English practice contrary to our own, *In re Lincoln*, 228 Fed. 70, 74 (E.D.N.Y. 1915), aff'd 241 U.S. 651; *In re Ezeta, supra*, 62 Fed. 972, 986, reached this conclusion on the ground that, regardless of whether the crimes charged were "offenses of a political character", the evidence showed that the prisoners' extradition was being sought "with a view to try or punish * * * [them] for a crime or an offence of a political character". The two other justices, however, rejected this view because "the court must not assume that the foreign state will not observe the terms of the treaty", and held that the "revolt of the crew was to prevent themselves being prosecuted for a political offence and * * * therefore, the offence had a political character". [1955] 1 Q.B. 547-549, 550.

Clearly, then, there are not, as the Court below seemed to think, "long standing judicial interpretations of similar treaty provisions" that would have to be "modified" in order to give effect to the Executive construction inherent in the participation of the United States, under the circumstances indicated, in the international acts above described. And even if it should be argued that some of the offenses defined as

war crimes by Article 6 of the Agreement of August 8, 1945, *supra*, pp. 10-11, are so essentially political in character that as to them the Executive interpretation could not fairly be given effect, this is hardly so as to those grouped together in paragraph (*c*) of such Article as "crimes against humanity",

> namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population * * *.

As to such crimes, the Executive construction recognizes the distinction made by Judge Lauterpacht, British member of the Court of International Justice and Whewell Professor of International Law at Cambridge, when he said, *The Law of Nations and the Punishment of War Crimes*, 1944 Br. Y.B. Int. L. 58, 90:

> * * * no demand for extradition * * * is likely—or ought—to succeed if it is contrary to the principle of non-extradition of political offenders. On the other hand, the very sanctity of that principle requires that it should not be abused for sheltering persons who, behind the screen of war, have been responsible for common crimes which have outraged civilized mankind.

So, too, in discussing the proposed international convention regarding genocide, it was said in (1949) 58 Yale L.J. 1142, 1154:

> Extradition provisions of the Convention would cause no dislocation of present American extradition policies. The Convention permits extradition only in accordance with laws and treaties presently existing. * * * The United States does not favor extradition of political offenders, * * * but its position does not conflict with the Convention's extradition provision. Genocide, in ef-

> fect mass-destruction, should not be considered a political crime for purposes of extradition. No political activity can justify the crime as defined. American procedures, moreover, would prevent extradition of any person against whom fabricated charges of genocide were made by a foreign government. * * *

See also, (1943) 43 Col. L. Rev. 960, 963-6; and Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, (1953) 14 U. of Pitt. L. Rev. 371, 394-6, where it is concluded that the offenses defined in paragraph (c) of Article 6 of the Agreement of August 8, 1945, *supra*, pp. 10-11, are not "political" offenses and are extraditable as ordinary crimes.

Under all the circumstances, the nature, manner and extent of United States participation in the international acts hereinabove described, particularly in bringing about the adoption in committee and by the United Nations General Assembly of the resolution of October 31, 1947, and the defeat of the Yugoslav proposal, necessarily implied and were premised upon an Executive construction that war crimes as defined in the Agreement of August 8, 1945, *supra*, pp. 10-11, to which the United States was a party, were not offenses of a "political character" within the meaning of provisions of extradition treaties like that here involved, to which the United States was a party. In failing to give recognition, consideration and weight to such Executive construction, the Court below decided a federal question in a way in conflict with applicable decisions of this Court.

3. Wholly apart from any construction by nations generally, including the United States, and any Executive construction, the Court below decided a federal question in a way in conflict with applicable decisions of this Court in holding that it appeared from the face of the indictment, and the attachment thereto, taken together with the facts of which judicial notice was taken, that only "offenses of a political character" were charged in the indictment.

As already noted, in *Ornelas* v. *Ruiz*, 161 U.S. 502 (1896), *supra*, pp. 41-42, the Commissioner had, after hearing, held the prisoners for extradition, notwithstanding their plea that the offenses charged were "of a political character" and evidence which showed that there had been a rebellion against the demanding government, that the prisoners were supporters of the rebels and that the offenses charged included an attack on government troops, the killing of some, the wounding and kidnapping of others, the burning of their barracks, and the taking of military equipment, and that the prisoners' object and purpose was "to * * * fight against the government". *Habeas corpus* was applied for and granted on the ground that the offenses charged were clearly of a "political character". On review this Court reversed, saying, 161 U.S. at 509:

> Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact * * *.

And, further, 161 U.S. at 511, 512:

> Can it be said that the commissioner had no choice on the evidence but to hold, in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed, that this was a movement in aid of a political revolt, an insurrection or a civil

war, and that acts which contained all the characteristics of crimes under the ordinary law were exempt from extradition because of the political intentions of those who committed them? In our opinion this inquiry must be answered in the negative.

The Court below, however, held that as a matter of law the murder of the men, women and children, the infants, the aged and the clergymen, as alleged in the indictment and attachment thereto, were all offenses of a "political character". The Court below reached this conclusion by drawing an unwarranted inference from the circumstance, not of record, but judicially noticed that "various factions representing different theories of government were struggling for power during this period in Croatia" (App. B., p. 14a, *infra*) and the fact (R. 503) that at the time, respondent was "Minister of the Interior" in the "Cabinet of Ante Pavelic" (App. B., p. 13a, *infra*), presumably one of the "factions".

But in *Ornelas* v. *Ruiz*, the evidence was that there was in actual progress an armed rebellion against the government, that the prisoners were supporters of the rebels, that the victims included government troops, and that military property of the government was among that destroyed and captured. Here it does not appear from the indictment and there has been no showing that the judicially noticed "struggle for power" between "various factions representing different theories of government" involved an armed conflict, or that respondent's alleged victims were members or supporters, in one way or another, of any "faction" engaged in such "struggle", nor, indeed, that their deaths are attributable to it. It does not appear that respondent's alleged victims were other than innocent,

peaceful men, women and children, as the indictment describes them, not engaged in any revolutionary, counter-revolutionary or other political activities. And, while in *Ornelas* v. *Ruiz*, the prisoners' purpose, according to the evidence, was to "fight against the government", here the allegation of the indictment (R. 464) is that the respondent's alleged crimes were "based on criminal motives, hatred and the desire for power * * *".

Yet in *Ornelas* v. *Ruiz*, this Court held, as we have seen, that "in view of the character of the foray, the mode of the attack, the persons killed or captured", it was not *necessarily* to be concluded that "acts which contained all the characteristics of crimes under the ordinary law were exempt from extradition because of the political intentions of those who committed them." The conflict between this Court's decision in *Ornelas* v. *Ruiz* and the decision below would appear clear.

Concededly, the respondent was a politician and a member of the unrecognized Pavelic regime which the Germans and Italians purported to establish in Croatia. But, in and of itself, this cannot serve to supply the political purpose or motive as to which the record is barren, and which must necessarily be found before any ordinary crime such as murder is metamorphosed into an offense of a "political character". For, as *Ornelas* v. *Ruiz* clearly holds, it is not the law, and it would be a monstrous doctrine if it were, that every offense committed by a politician or in the course of a civil disturbance is necessarily an offense of a "political character". Furthermore, while the Court below quotes at length from the several opinions in *In re Castioni*, [1891] 1 Q.B. 149, which it describes as

"[p]erhaps the leading case on the subject", including two passages from the opinion of Hawkins, J., (App. B., pp. 10a-11a, *infra*) it fails even to refer to the following portion of the opinion of Hawkins, J., [1891] 1 Q.B. at 164, 165, which just precedes the part of his opinion it quotes first:

> Now, I entirely dissent, and I think all reasonable persons would dissent, from the proposition that any act done in the course of a political rising, or in the course of any insurrection, is necessarily of a political character. Everybody would agree, I think, with this—that it is not everything done during the period during which a political rising exists that could be said to be of a political character. A man might be joining in an insurrection, joining in a rising, joining in that which in itself is a pure political matter, but notwithstanding that he were engaged in a political rising, if he were deliberately, for a matter of private revenge or for the purpose of doing injury to another, to shoot an unoffending man, because he happened himself to be one of an insurgent crowd and had a revolver in his hand, no reasonable man would question that he was guilty of the crime of murder, because that offence so committed by him could not be said to have any relation at all to a political crime * * *.

Similarly, it is said in Moore, *Act of State in English Law* (Dutton, 1906) 116:

> If * * * it can be shown that the acts, though done in the course of a political disturbance, are not really referable to it, but are substantive acts of spoliation or vengeance, then * * * they would for purposes of extradition lose their political immunity * * *.

Thus, while it may be true that there were "various factions representing different theories of government

* * * struggling for power during this period in Croatia", it does not appear that the respondent's alleged victims were other than the "peaceful civilian[s]", etc., described in the indictment or mere "unoffending" individuals, who, to use Mr. Justice Hawkins' words, were done to death "deliberately * * * for the purpose of doing injury to another". In this regard the Court below seemed content to rely (App. B., pp. 13a-14a, *infra*) on the recitations contained in the prosecutor's "Explanation" attached to the indictment that (R. 511, 512)

> Direction and control over the concentration camps, over the internment of people in the camps and over the treatment * * * was discharged, along with Pavelic, by * * * Artukovic * * *. This has been established through numerous so-called legal and other kinds of orders which were prepared by * * * Artukovic himself, which he issued and signed alone or together with Pavelic.

And that

> Artukovic together with Pavelic prescribed a so-called legal order on August 16, 1941, on the "Ustasha Security Service" which under the "Legal Order" of November 25, 1941, controlled concentration camps and passed decisions on deportation to these camps.

But these passages demonstrate merely that the respondent had the means of committing mass murder, not that the murders were "political" in character.

The decision of the Court below seems to involve an untenable syllogism: (1) There was a struggle for political power among various factions in Croatia at the time when respondent's alleged victims were murdered there; (2) The respondent was at that time a

leader of one of the factions; *ergo,* (3) If the respondent murdered his alleged victims, his crimes were offenses of a "political character". But, clearly, even if the premises be accepted, the conclusion does not follow unless the murders were related to the struggle, and were motivated by a political purpose. *Habeas corpus* having been granted before hearing, no such showing has been made by the respondent, and there is nothing in the indictment or its attachment which, as a matter of law, requires that such inferences be drawn.

Furthermore, since the regime of which respondent was a leader went unrecognized by the United States, his acts even as such, are not *per se* political and thus immune from judicial scrutiny. *Latvian State Cargo & Passenger S.S. Line* v. *McGrath*, 188 F. (2d) 1000 (D.C. Cir. 1951), cert. denied 342 U.S. 816; *The Maret*, 145 F. (2d) 431 (3rd Cir. 1944). For, respondent's acts, even if "official", are not protected by the prophylactic rule which, to avoid prejudice to the Executive's conduct of foreign relations, precludes the Courts, in the absence of the Executive's consent, from passing upon the character of the acts of an officer of a recognized foreign government, as such, done within its territory. *Cf. Bernstein* v. *Van Heyghen Freres*, 163 F. (2d) 246 (2d Cir. 1947), cert. denied 332 U.S. 772; *Bernstein* v. *N. V. Nederlandsche Amerikaansche Stoomvart Maatschappij*, 173 F. (2d) 71 (2d Cir. 1949), mandate amended after Executive consent, 210 F. (2d) 375 (2d Cir. 1954). Indeed, in *In re Ezeta*, 62 Fed. 972 (N.D. Cal. 1894), relied on by the Court below, the status of the prisoners as officers of a recognized government attempting to suppress a revolt was not sufficient to preclude judicial inquiry to determine

whether the acts with which they were charged were *in fact* of a "political character", as they claimed, where the revolt had succeeded and recognition had in the meantime been withdrawn from the defeated government and granted to the successful revolutionaries.

So far as can be ascertained, there has been no other case (and the Court below has cited none) in which *before hearing* a prisoner was released on *habeas corpus* on the ground that the offense charged was not extraditable as being of a "political character". This is not surprising, for whether a particular offense is or is not an extraditable offense is, as this Court said in *Ornelas* v. *Ruiz*, *supra*, 161 U.S. at 509, "a question of mixed law and fact, but chiefly of fact". So, too, in Harvard Research in International Law, Pt. 1, *Extradition*, (1935) 29 Am. J. Int. L., Supp., 113, it is said:

> No satisfactory and generally acceptable definition of a political offense has been found yet, and such as have been given are of little practical value, since, as Judge Moore pointed out, "the question whether a particular act comes within that category is preeminently circumstantial."[15]

Moreover, for an offense to be of a political character, it has been authoritatively stated that it must have been committed in the furtherance of one side or another of a *bona fide* civil disturbance. Thus, in *In re Meunier*, [1894] 2 Q.B. 415, 419, Mr. Justice Cave said:

> It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the

[15] 1 Moore, *Extradition* (1891) 308

> other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not.

A similar test is laid down in 2 Stephen, *History of the Criminal Law of England* (1883) 70, 71, where it is said that to constitute a political offense, the offense must be a part of group activity, "incidental to and * * * part of political disturbances." And in *In re Castioni, supra,* [1891] 1 Q.B. at 159, Mr. Justice Denman said:

> The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part.

While the Courts below purported, without reference to any source for their information, to take judicial notice that at the time in question "various factions" were "struggling for power" in Croatia, there is nothing in the indictment or the attachment thereto indicating any such situation at the time and place of the commission of the alleged offenses, or that respondent's alleged victims met their fate as a result of it. It does not appear that there was in fact any civil disturbance or that the offenses charged were referable to a civil disturbance, even if there were one, as the Courts below apparently believed. It would appear clear from the attachments to the amended complaint that the respondent's alleged victims met their fate because of their race or nationality. What political purposes can be claimed for the alleged murders of the 230 children under the age of fourteen, including infants in arms, the 147 Serbian priests and the 48

Jewish rabbis and cantors? So far as appears from the face of the indictment and its attachment, what was involved was a gigantic racial lynching-bee, and it is beyond belief that the United States would agree that such offenses against minority groups within its borders would be of such a "political" character as to immunize its perpetrators from extradition from any foreign country in which they might seek refuge.

Furthermore, it would seem abundantly clear that whatever other elements are necessary to transform acts having all the elements of ordinary crimes into political offenses, the one essential is that they be directed *against a government or against a group trying to seize the government of a country.* Thus, in *In re Meunier, supra,* [1894] 2 Q.B. at 419, the Court, in refusing a writ of *habeas corpus* to a bomb-throwing anarchist, held that the crimes charged to the prisoner were not of a "political character" so as to bar extradition, not only because they were not committed, to paraphrase Mr. Justice Cave's remarks quoted *supra*, pp. 53-54, in an effort to sustain or grasp governmental power, but also because they were

> * * * directed primarily against the general body of citizens.

So, too, in the case at bar. There is nothing in the indictment or its attachment from which it can be inferred that respondent's alleged victims were of a party in contest with his for governmental power. On the contrary, so far as appears, all of respondent's alleged victims, and certainly the children whose murders are alleged, were peaceful people belonging to no party engaged in any struggle for such power. Indeed, a reading of the Yugoslav indictment leaves

no doubt but that the offenses alleged were directed against a general body of citizens in Croatia of certain races and national origins, and not against a government or a party contending for governmental power.

It would thus appear clear that the decision of the Court below, in holding that the alleged crimes are, as a matter of law, offenses of a "political character", has decided a federal question in a way in conflict with an applicable decision of this Court.

IN CONCLUSION

In view of the questions concerning the meaning and the effect to be given to Executive action which this proceeding poses, it is to be regretted that the Government has not appeared as *amicus* in this branch of the case, as it did in the other, where the question was whether there was an extradition treaty in force and effect between the United States and Yugoslavia. See *Ivancevic* v. *Artukovic*, 211 F. (2d) 565 (9th Cir. 1954), cert. denied 348 U.S. 818, rehearing denied 348 U.S. 889. But in its *amicus* brief below in the other branch of the case, copies of which were lodged with the Clerk of this Court in opposition to the petition for certiorari then filed by the present respondent, the Government said (p. 5):

> As the decision, [i.e., of the District Court that no treaty was in effect] if not reversed, will affect the entire treaty structure, it is believed that the Government's interest in the case transcends in importance the interest of the parties to these proceedings whose sole interest is the matter of the possible extradition of the appellee. The Executive Branch of the Government is not presently concerned with this phase of the case and will not be concerned with it unless it shall have been certified to the Department of State by the extradi-

tion magistrate pursuant to the provisions of 18 U.S.C. 3184.[16]

[16] In this connection, it should be noted that the Yugoslav Government formally requested the United States to surrender the respondent as an alleged war criminal in 1946, when he was believed to be in American-occupied Austria or Italy, and again in 1951, when it was ascertained that he actually was in Los Angeles, California (R. 79, 80). In response to the latter request the Department of State replied (R. 80-82):

> • • • as a result of the circumstances attending Dr. Artukovic's entry into and continued stay in this country proceedings have been instituted • • • with a view to his deportation. If the deportation of Dr. Artukovic is not effected, the Secretary of State will be pleased to give consideration, after the necessary forms of law have been complied with, to a request • • • for the extradition of the accused pursuant to the provisions of the Extradition Treaty of October 25, 1901 • • •. In this connection it is pointed out that, in accordance with the provisions of Title 18, U.S.C. sec. 3184, extradition from the United States can be effected only on the basis of a treaty • • • of extradition.
>
> • • •
>
> it • • • [is] not intended • • • to imply that it would be necessary • • • to await the outcome of the deportation proceedings • • • before making a formal request for • • • extradition • • • or before a warrant could be obtained for the provisional arrest and detention with a view to the extradition of the accused. The formal request for the extradition of Dr. Artukovic may be filed at any time and, acting in accord with the provisions of Title 18, U.S.C., Section 3184, a duly authorized representative of the Yugoslavia Government, possibly one of its Consular officers • • •, could be at liberty to swear out a warrant for the arrest of the accused with a view to his extradition, notwithstanding that deportation proceedings are pending. The Department of State cannot give any assurance, however, as to what action may be taken following the issuance of such a warrant of arrest since that will be within the jurisdiction of the judicial branch of the Government.
>
> Finally, the Department of State wishes to point out that • • • it is without authority to act in the matter until it shall have received from the extradition magistrate a transcript of the proceedings in the hearing required by Title 18, U.S.C., Section 3184.

The Government has apparently adhered to that decision, and accordingly, neither the Court nor the parties have the benefit of its views on this branch of the case. But this is not unusual in extradition cases, even in those which, like this, pose questions of the utmost importance to the Executive branch in its conduct of foreign affairs. See, e.g., *Terlinden* v. *Ames*, 184 U.S. 270 (1902); *Charlton* v. *Kelly*, 229 U.S. 447 (1913); *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933); *Valentine* v. *U. S. ex rel. Neidecker*, 299 U.S. 5 (1936). The Government's participation in the previous aspect of this case would appear to have been exceptional.

But be that as it may, this proceeding involves an important question of federal law, which has not, but in the circumstances in which the world now finds itself, should be settled by this Court. It also involves decisions on questions of federal law which are in direct conflict with applicable decisions of this Court. Accordingly, and for all of the reasons hereinabove set forth, this petition should be granted.

Respectfully submitted,

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SEPTEMBER 16, 1957

APPENDIX A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 13467—PH

ANDRIJA ARTUKOVIC, *Petitioner*,

vs.

JAMES J. BOYLE, United States Marshal, *Respondent*.

ORDER FOR ISSUANCE OF WRIT OF HABEAS CORPUS

The holding of this court—107 F. Supp. 11—that no treaty was in existence between the United States of America and the country now known as Yugoslavia, was reversed by the United States Court of Appeals for the Ninth Circuit—211 F. 2d 565, Certiorari denied 348 U.S. 818.

Article VI of the Treaty, in its pertinent portion, provides as follows:

> "A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded be of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character."

The matter is before the court on a Petition for Writ of Habeas Corpus prior to any hearing by a Committing magistrate. The function of the court at this time on this hearing is not that of a Committing magistrate, (Wright v. Henkel, 190 U.S. 40), and its power on a writ prior to such a hearing is confined to the limited and narrow question as to whether or not the Complaint states an extraditable offense under the treaty. Hence, this court cannot at this time consider that section of the treaty which provides that one shall not be surrendered "if he proves

that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character." If the defendant can make such proof, the time and place to make it is at the hearing before the Committing magistrate. This court may now only consider whether or not the facts set forth on the face of the Complaint, together with the facts of which the court may take judicial notice (Jones v. United States, (1890) 137 U.S. 202, at 214), make the offense in respect of which the surrender of petitioner is demanded one "of a political character."

The text of the Complaint differs from the Indictment, but it has attached to it a copy of the Indictment as it was filed in the demanding country. The text of the Indictment made in the demanding country controls over the text of the Complaint wherein there is any difference. And the whole Indictment must be read to determine whether or not within its four corners the conduct complained of was "of a political character."

The Indictment charges that the petitioner was "Minister of the Interior" from April 16, 1941, to October 10, 1942, in the cabinet of a government called "Pavelic" government. Many references are made to the fact that during the entire period involved in the Indictment, the petitioner occupied such position in such government. The court takes judicial notice of the fact that prior to, or at, or about, the time of the invasion of Yugoslavia by the German armies in early April, 1941, the head of the government of Yugoslavia, and all of the principle officials of that government, fled the country; and that on April 10, 1941, the portion of Yugoslavia known as "Croatia" established an independent government with a full set of officers, and sought recognition by other governments (and secured recognition by some governments), in which the petitioner became an official and was Minister of the Interior of that government during all of the period of time covered by the Indictment.

It appears from the face of the Indictment that all of the asserted offenses for which extradition is sought were the result of "orders" issued by the petitioner, acting as such official of the above-mentioned government during the time of war.

The Indictment is in vehement language, and it and the briefs of the parties reflect the animus which has existed between the Croatians and the Serbs for many hundreds of years, as well as the deep religious cleavage known to exist among the peoples in the Balkans.

The Court has not counted the number of persons named, but notes that according to the parties, the Complaint names 1,293 persons as having been killed on "orders" of the petitioner.

But the Indictment does not stop at that. In Paragraph 7 on page 9, it is alleged that 30,000 unidentified persons were killed on "orders" of the petitioner. And further, in Paragraph 7 on page 14, approximately 3,000 more unidentified persons are alleged to have been killed on "orders" of the petitioner. In Paragraph 8 on page 15, it is alleged that as a result of "orders" of the petitioner, 200,000 persons were killed. On page 17, it is alleged that a total of 17,600 unidentified children were killed on "orders" of the petitioner.

It would be a work of supererogation to analyze the Indictment further. Though the Indictment is not bad because it charges the death of more than one person, the plain reading of the Indictment here makes it immediately apparent that the offenses for which the surrender of the petitioner is sought, were offenses of a political character. (In re Ezeta, 62 Fed. 972, and cases there cited.) See also: Hackworth—Digest of International Law, Vol. IV, 1952 Ed., page 45 et seq., Section 316, and cases there collected, which show that officials of the United States, Mexico and many other countries on similar accusations, have uniformly held that conduct, such as that with

which petitioner is charged in the Indictment here, was conduct of a political character and not extraditable under a treaty in terms such as the one before the court.

The petitioner is clearly entitled to the Writ of Habeas Corpus, and it is hereby ordered that such Writ of Habeas Corpus issue, and that thereupon petitioner be discharged and his bail exonerated.

Dated: Los Angeles, California, this 3rd day of April, 1956.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed April 3, 1956.

Docketed and entered April 4, 1956.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,217

June 24, 1957

BRANKO KARADZOLE, Consul General of the Federal People's Republic of Yugoslavia, and ROBERT W. WARE, United States Marshal, *Appellants*,

vs.

ANDRIJA ARTUKOVIC, *Appellee*.

Appeal from the United States District Court for the Southern District of California, Central Division

Before: STEPHENS, HEALY and POPE, Circuit Judges

STEPHENS, Circuit Judge

This is a case of first impression involving extradition of an alleged World War II war criminal. Rafo Ivancevic, Consul General of the Federal People's Republic of Yugo-

slavia, in August, 1951, filed, with the United States Commissioner at Los Angeles, California, a formal request upon behalf of his country that an order issue for the extradition of appellee Andrija Artukovic, alias Alois Anich, to Yugoslavia, in which country a warrant is outstanding for his arrest as a fugitive charged with the crime of murder.[1] An amended complaint was filed October 15, 1951. The Commissioner ordered Artukovic held by the United States Marshal, and Artukovic thereupon petitioned the District Court for the issuance of the writ of *habeas corpus* praying that the court order his release. Artukovic attacked the jurisdiction of the proceedings on two grounds: i.e., that the charge against him was of a political nature and therefore was not an extraditable offense,[2] and that no treaty of extradition existed between the United States and Yugoslavia. After a hearing, the District Court held that the extradition treaty of 1902 between the United States of America and the Kingdom of Servia (Serbia) was not in force and effect between the United States of America and Yugoslavia, and ordered the release of appellee Artukovic. *Artukovic* v. *Boyle*, 107 F. Supp. 11. The United States and Rafo Ivancevic, as Consul General of Yugoslavia, appealed. This Court reversed, holding that the extradition treaty between the United States and the Kingdom of Servia (Serbia) in 1902 is a valid and effective treaty between the United States and the Federal People's Republic of Yugoslavia and remanded the case to the District Court for the adjudication of other issues in the case. *Ivancevic* v. *Artukovic*, 9 Cir., 1954, 211 F.2d 565, certiorari denied 348 U.S. 818, rehearing denied 348 U.S. 889. Further hearings were held in the District Court as to the remaining issue, and that Court decided

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[1] Title 18 U.S.C.A. § 3184; Article II of the Treaty of Extradition between the United States of America and the Kingdom of Servia (Serbia), proclaimed May 17, 1902, 32 Stat. 1890.

[2] Crimes of a political nature are specifically excluded as subjects for extradition under Article VI of the Treaty of Extradition between the United States of America and the Kingdom of Servia.

that the alleged offenses charged in the amended Complaint were of a "political character" within the meaning of Article VI of the treaty[3] and that therefore appellee Artukovic could not be extradited. The District Judge pointed out that the matter was before him prior to any hearing by a committing magistrate, and the sole function of the court was to determine whether on the face of the pleadings an extraditable offense under the treaty was stated. The court noted that the text of the amended Complaint differed from the Indictment, but that the Complaint had attached to it a copy of the Indictment as it was filed in the office of the County Public Prosecutor, Zagreb, Yugoslavia. The District Court read the Complaint and the Indictment as a whole and made the following comments in its Order:

> "The Indictment charges that the petitioner was 'Minister of the Interior' from April 16, 1941 to October 10, 1942, in the cabinet of a government called 'Pavelic' government. Many references are made to the fact that during the entire period involved in the Indictment, the petitioner occupied such position in such government. The court takes judicial notice of the fact that prior to, or at, or about, the time of the invasion of Yugoslavia by the German armies in early April, 1941, the head of the government of Yugoslavia, and all of the principle [sic] officials of that government, fled the country; and that on April 10, 1941, the portion of Yugoslavia known as 'Croatia' established an independent government with a full set of officers, and sought recognition by other governments (and secured recognition by some governments), in which the petitioner became an official and was Minister of the

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[3] Article VI of the treaty, in its pertinent portion, provides as follows:

> "A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded be of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character."

Interior of that government during all of the period of time covered by the Indictment.

"It appears from the face of the Indictment that all of the asserted offenses for which extradition is sought were the result of 'orders' issued by the petitioner, acting as such official of the above-mentioned government during the time of war.

"The Indictment is in vehement language, and it and the briefs of the parties reflect the animus which has existed between the Croatians and the Serbs for many hundreds of years, as well as the deep religious cleavage known to exist among the peoples in the Balkans.

"The Court has not counted the number of persons named, but notes that according to the parties, the Complaint names 1,293 persons as having been killed on 'orders' of the petitioner.

"But the Indictment does not stop at that. In Paragraph 7 on page 9, it is alleged that 30,000 unidentified persons were killed on 'orders' of the petitioner and further, in Paragraph 7 on page 14, approximately 3,000 more unidentified persons are alleged to have been killed on 'orders' of the petitioner. In Paragraph 8 on page 15, it is alleged that as a result of 'orders' of the petitioner, 200,000 persons were killed. On page 17, it is alleged that a total of 17,600 unidentified children were killed on 'orders' of the petitioner.

"It would be a work of supererogation to analyze the Indictment further. Though the Indictment is not bad because it charges the death of more than one person, the plain reading of the Indictment here makes it immediately apparent that the offenses for which the surrender of the petitioner is sought, were offenses of a political character. (In re Ezeta, 62 Fed. 972, and cases there cited.) See also: Hackworth—Digest of International Law, Vol. IV, 1952 Ed., page 45 et seq., Section 316, and cases there collected, which show that officials of the United States, Mexico and many other countries on similar accusations, have uniformly held that conduct, such as that with which petitioner is charged in the Indictment here, was conduct of

a political character and not extraditable under a treaty in terms such as the one before the court."

The District Judge held (for the reasons above set forth) that Artukovic was entitled to the writ of *habeas corpus* and ordered its issuance and his discharge from custody. *Artukovic* v. *Boyle*, 1956, 140 F. Supp. 245. Appellant, Branko Karadzole, substituted as Consul General of the Federal People's Republic of Yugoslavia, appeals from that judgment.[4]

THE APPEAL

This proceeding arises on *habeas corpus* prior to hearing before a committing magistrate, and is entirely proper if the District Court confines its determination to the question whether the committing magistrate has jurisdiction.[5] *Terlinden* v. *Ames*, 1902, 184 U.S. 270, *In re Heilbonn*,

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[4] In the earlier appeal to this Court, the United States filed an amicus curiae brief requesting reversal of the District Court judgment as to the non-existence of a valid treaty between the United States and Yugoslavia. It was stated in the government's brief that the "Executive Branch of the Government is not presently concerned with this phase of the case [whether Artukovic is extraditable under the treaty] and will not be concerned with it unless and until it shall have been certified to the Department of State by the extradition magistrate pursuant to the provisions of 18 U.S.C. § 3184." The government has filed no brief in the instant appeal and Robert W. Ware, U. S. Marshal, is only a nominal party.

[5] We find in II Hyde, *International Law* (2nd Revised Edition, 1945), p. 1026, footnote 3, the following language which is here pertinent:

> "• • • The situation [that there is no appeal from the decision of the committing magistrate] would be otherwise, however, in the fanciful case where, irrespective of the testimony offered, it should appear from the allegations of the complaint that extradition of the accused was sought in order to prosecute him for a political offense, and the decision of the committing magistrate was adverse to the contentions of the prisoner."

In the instant case we have no decision of the magistrate, but if the complaint and attached documents clearly show a political offense, such decision would not be necessary.

N. Y., 1853, 1 Parker, Cr.R. 429. The committing magistrate has jurisdiction, at this stage of the case, if there is a treaty and the commission of extraditable offenses is charged. *Terlinden* v. *Ames*, supra; *In re Luis Oteiza y. Cortes*, 1889, 136 U.S. 330; *In re Stupp*, 1875, 12 Blatchf. 501, 23 Fed. Cas. No. 13,563; *Ornelas* v. *Ruiz*, 161 U.S. 508; *Fernandez* v. *Phillips*, 268 U.S. 211. In *Terlinden* v. *Ames*, supra, the writ of *habeas corpus* was issued before the examination by the commissioner was entered upon, and the inquiry was held to be confined to the question of jurisdiction of the commissioner or magistrate. It was therein determined that the committing magistrate had jurisdiction and the petition for the writ was dismissed. But it was pointed out in the case that "On the face of the complaint extraditable offences were charged to have been committed. . . ."

We have previously held that a valid treaty exists between the United States and Yugoslavia. *Ivancevic* v. *Artukovic*, supra. The sole question therefore before the District Court was whether on the face of the Complaint and the attached Indictment, together with the facts of which the court could take judicial notice, it could clearly be said that the offenses charged were of a political character. Appellant argues that it was error for the District Court to so hold. We initially determine this point without considering any possible legal significance that might result because the offenses charged are called "war crimes" in the Indictment, and the fact that appellant admits that Artukovic is sought as a "war criminal." Perhaps the leading case on the subject is *In re Castioni*, (1891), 1 Q.B. 149. In that case, the following pertinent comments are made:

Denman, J. (page 156).

"I think that in order to bring the case within the words of the Act and to exclude extradition for such an

act as murder, which is one of the extradition offences, it must be shewn that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act."

Denman, J. (page 159).

"The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part."

Hawkins, J. (page 165).

"Now what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his History of the Criminal Law of England in vol. ii, pp. 70, 71. I will not do more than refer to the interpretations, other than those with which he agrees, which have been given upon this expression, 'political character': but I adopt his definition absolutely. 'The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requisition would be robbery. According to the common use of language, how-

ever, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration.'"

Hawkins, J. (page 167).

"I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over. For the reasons I have expressed, I am of the opinion that this rule ought to be made absolute, and that the prisoner to be discharged."

The *Castioni* case was recently reconsidered by the English courts (Queen's Bench Division) in *Ex parte Kolczynski*, 1954, 2 Weekly Law Reports 116 (1955); 1 All. E. R. 31. The case involved seven Polish sailors who seized control of a trawler and steered to an English port where they sought asylum. Warrants were issued in Warsaw charging them with extraditable offenses. The English court held that the seamen had proved to the satisfaction of the court that the requests for extradition had in fact been made with a view to trying or punishing

them for an offense of a political character.[6] It was stated in the case:

Cassels, J.

"'The words "offence of a political character" must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1891, when Castioni's case was decided. * * *"

Lord Goddard, C. J., stated:

"The Court in *Castioni's* case were careful to say that they were not giving an exhaustive definition of the words 'of a "political character."' * * * The evidence about the law prevalent in the Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused."

American cases[7] have more or less adopted language used in *Castioni*. In the instant case we are dealing with a so-called relative political offense in that a common crime is

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[6] In the *Kolczynski* case, we note that the opinion of Hawkins, J., in *In re Castioni*, 1 Q.B. 149, 163, as to the duties of magistrates was not followed. The opinion apparently stands (although the point is not entirely clear) for the proposition that in England the committing magistrate is to determine whether the requisition for the surrender of the fugitive criminal has *in fact* been made with a view to try to punish him for an offense of a political character. See comment in 18 Modern Law Review 380, (1955, Stevens & Sons Limited, London). Compare discussion of similar problem in American cases of *In re Lincoln*, 228 Fed. 70, 74; *In re Ezeta*, 62 Fed. 972 (E.D. Calif. 1894) and *Laubenheimer* v. *Factor*, C.C.A. 7, 1932, 61 F.2d 626, 628.

[7] *In re Ezeta*, 62 Fed. 972 (N.D. Cal. 1894); *Ornelas* v. *Ruiz* (1896), 161 U.S. 502; *Luis Oteiza y Cortes* v. *Jacobus*, 136 U.S. 330; *United States ex rel. Giletti* v. *Commissioner of Immigration*, 35 F.2d 786.

said to be connected with a political act.[8] Other than the fact that Artukovic is called a "war criminal" by appellant, we note the following facts as showing a marked degree of connection between the alleged murders and a political element. Appellee Artukovic is not charged with personally murdering anyone, rather it is charged that the murders were carried out on his "orders."[9] The Indictment accuses Artukovic "for having, in the course of 1941 and 1942, when Yugoslavia was occupied by German and Italian troops, issued orders based on criminal motives, hatred and the desire for power, to members of bands of which he was one of the leaders, to carry out mass slaughters of the peaceful civilian population of Croatia, Bosnia and Herzegovina. . . ." The Indictment states (in the Explanation of the Indictment) that the "accused Artukovic was the so-called Minister of the Interior in the 'Cabinent' of Ante Pavelic." It is also stated that "Direction and control over the concentration camps, over the internment of people in the camps and over the treatment (Point 8 of the Indictment) was discharged, along with Pavelic, by the accused Artukovic, who was the so-called Minister of the Interior in Pavelic's 'Cabinet' at that time. This has been established through numerous so-called legal and other kinds of orders which were prepared by the accused Artukovic himself, which he issued and signed alone or together with Pavelic. * * *" It is also stated that Artukovic and Pavelic prescribed a "so-called legal order on August 16, 1941, on the 'Ustasha Security Service' which under the 'Legal Order' of November 25,

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[8] See Vol. I *Oppenheim's International Law*, Lauterpacht (7th Ed. 1948) § 334; Garcia-Mora, "The Present Status of Political Offenses in the International Law of Extradition and Asylum," 14 *University of Pittsburgh Law Review* 371; Garcia-Mora, *International Law and Asylum as a Human Right*, Public Affairs Press, 1956, pp. 73-102.

[9] Appellant, in its brief, points out that "participation" in any of the enumerated crimes and offenses is also an extraditable offense if such participation may be punished in the United States as a felony. Article II of the treaty.

1941 controlled concentration camps and passed decisions on deportations to these camps." The Indictment further states that the "crimes committed by the accused Artukovic simultaneously constitute great international crimes forseen by International Law, specifically Law No. X of the Central Council for Germany and by Article 6 of the Statute of the International Military Tribunal . . ." The amended Complaint alleges over 200,000 murders or participations in murders.

The District Court properly took judicial notice of the fact that Ante Pavelic was the Premier of Croatia during World War II, and of the fact that various factions representing different theories of government were struggling for power during this period in Croatia. We conclude that the finding by the District Court that the offenses for which the surrender of Artukovic was sought were offenses of a political character was correct.

We now consider the question whether because the offenses are also called "war crimes" they have lost their character as "political offenses" within the meaning of the treaty. Appellant argues that "war crimes" are crimes for which extradition is to be granted within the meaning of international acts to which the United States is a party. It is argued by recent legal writers that the "barbarity and atrocity of the crimes [crimes against the law of war and crimes against humanity] committed weigh so heavily upon the common crime element that the political act has practically ceased to exist and, therefore, that the extradition of the offender is the only justifiable course of action."[10]

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[10] Garcia-Mora, *International Law and Asylum as a Human Right*, pp. 9-102 and particularly pp. 91-93, commented on in 24 *University of Chicago Law Review* 202 and 55 *Michigan Law Review* 618; 21 *The British Yearbook of International Law* (1944). 59-95, Lauterpacht; Vol. IV *Oppenheim's International Law* (7th Ed. 1952), Lauterpacht, pp. 566-588 and particularly footnote 4, p. 588; Garcia-Mora, "The Present Status of Political Offenses," 14 *University of Pittsburgh Law Review* 371, 394. G.f. Neumann, Neutral States and the Extradition of War Criminals," 45 *American Journal of International Law* 495.

Appellant in essence argues that by virtue of resolutions[11]

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[11] United Nations Resolution of February 13, 1946: (United Nations Yearbook, 1946-47, p. 66)

"THE GENERAL ASSEMBLY:

taking note of the Moscow Declaration of 1 November 1943 by President Roosevelt, Marshal Stalin and Prime Minister Churchill concerning enemy atrocities in the course of the war, and of the declaration by certain allied governments of 13 January and 18 December 1942 concerning the same matter;

taking note of the laws and usages of warfare established by the fourth Hague Convention of 1907;

taking note of the definition of war crimes and crimes against peace and against humanity contained in the Charter of the International Military Tribunal dated 8 August 1945;

believing that certain war criminals continue to evade justice in the territories of certain States;

RECOMMENDS

that Members of the United Nations forthwith take all the necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in the above crimes, and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries;

AND CALLS UPON

the Governments of States which are not members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries."

See also Resolution of General Assembly adopted December 15, 1946, as to the screening of displaced persons, refugees, prisoners of war and other persons of similar status, with a view to identifying war criminals, quislings and traitors. (United Nations Yearbook, 1946-47, p. 170)

Resolution of General Assembly, October 31, 1947: (United Nations Yearbook, 1947-48, p. 222)

"*The General Assembly*

Noting what has so far been done in the matter of the surrender and punishment, after due trial, of the war criminals referred to in its resolution adopted on 13 February 1946,

Reaffirms the aforementioned resolution;

Reaffirms also its resolutions on the subject of refugees adopted

taken in 1946 and 1947 by the United Nations General Assembly as to the surrender of alleged war criminals, it is incumbent on this Court to hold that Artukovic is charged with an offense which is extraditable.

We have examined the various United Nations Resolutions and their background and have concluded that they have not sufficient force of law to modify long standing judicial interpretations of similar treaty provisions. Perhaps changes should be made as to such treaties. A well-known authority[12] recently commented on the point as follows:

> "It would appear that codification of offenses against the law of nations should be developed to indicate those offenses with a political aspect which should be excluded from the concept of 'political offense' and made subject to extradition to the country where the offense was committed, or to the jurisdiction of an international criminal tribunal, if such were established. * * * It seems probable, however, that due process of law would be better assured if an international criminal tribunal had jurisdiction of such offenses."

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on 12 February 1946 and on 15 December 1946;

Recommends Members of the United Nations to continue with unabated energy to carry out their responsibilities as regards the surrender and trial of war criminals;

Recommends Members of the United Nations, which desire the surrender of alleged war criminals or traitors (that is to say nationals of any State accused of having violated their national law by treason or active collaboration with the enemy during the war) by other Members in whose jurisdiction they are believed to be, to request such surrender as soon as possible and to support their request with sufficient evidence to establish that a reasonable *prima facie* case exists as to identity and guilt, and

Reasserts that trials of war criminals and traitors, like all other trials should be governed by the principles of justice, law and evidence."

[12] Quincy Wright, Professor Emeritus of International Law, University of Chicago, 24 *University of Chicago Law Review* 202, 206.

Other points raised by the appellant we need not consider based on our decision.

Judgment affirmed.

(Endorsed:) Opinion. Filed June 24, 1957.

Paul P. O'Brien, Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15217

BRANKO KARADZOLE, Consul General of the Federal People's Republic of Yugoslavia, and ROBERT W. WARE, United States Marshal, *Appellants*,

vs.

ANDRIJA ARTUKOVIC, *Appellee*.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: June 24, 1957

PAUL P. O'BRIEN, Clerk

APPENDIX D

Extradition Treaty between the United States and Serbia

Concluded October 25, 1901; ratification advised by Senate January 27, 1902; ratified by President March 7, 1902; ratifications exchanged May 13, 1902; proclaimed May 17, 1902. 32 Stat. 1890.

* * *

ARTICLE I.

The Government of the United States and the Government of Servia mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the high contracting parties, shall seek an asylum or be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offense had been committed there.

ARTICLE II.

Extradition shall be granted for the following crimes and offenses:

1. Murder, comprehending assassination, parricide, infanticide, and poisoning; attempt to commit murder; manslaughter, when voluntary.

* * *

Extradition is also to take place for participation in any of the crimes and offenses mentioned in this Treaty, provided such participation may be punished in the United States as felony and in Servia as crime or offense as before specified.

* * *

ARTICLE VI.

A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded be of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character.

No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished, for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the Government on which the demand for surrender is made, or which may have granted the extradition, shall be final.

• • • •

Act of June 25, 1948, c. 645, 62 Stat. 822 (Tit. 18 U.S.C. Sec. 3184):

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may

issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Act of June 25, 1948, c. 646, 62 Stat. 964, as amended May 24, 1949, c. 139, Sec. 112, 63 Stat. 105 (Tit. 28 U.S.C. Sec. 2241):

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. • • •

• • •

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; • • •

Act of June 25, 1948, c. 646, 62 Stat. 965 (Tit. 28 U.S.C. Sec. 2243):

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good

cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

* * *

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.